SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted]...

237

BISHOP COLLINS,
Petitioner,

v.

STATE OF WASHINGTON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN CAUGHLAN
Attorney for Petitioner
IRVING C. PAUL
ROGER W. JOHNSON
Of Counsel

Office and Post Office Address:
620 Arctic Building
Seattle, Washington 98104

METROPOLITAN PRESS [redacted] SEATTLE, WASH.

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IN THE

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October Term, 1968

No. .....

BISHOP COLLINS,
Petitioner,

v.

STATE OF WASHINGTON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BISHOP COLLINS, Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered in the above entitled case on March 14, 1969. R.0091.[1]

CITATIONS TO OPINIONS BELOW

The judgment to which this petition is directed was entered without opinion on March 14, 1969, denying petitioner's motion to recall the remittitur entered on the

1. References are to the pagination of the typewritten record certified by the court below.

opinion of the court dated December 14, 1967. R.0091. The 1967 opinion, R.0063 to 0068, is reported at 72 Wn.2d 741, 435 P.2d 538, and is set forth in full at appendix pages A-1 to A-5 below. The order of the trial court which was reversed and set aside by the 1967 opinion is unreported. R.0004 to 0005. It is set forth in full at appendix pages A-6 to A-7 below.

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on March 14, 1969. R.0091. A timely motion for rehearing was filed on April 7, 1969 R.0092 to 0095, but it was not acted upon by the court because it was directed to an order and not an opinion. There is no provision for rehearing under these circumstances. Rule 50, Rules on Appeal, Washington Court Rules.

The jurisdiction of this court is invoked under 28 U.S.C., 1257 (3), in that a right and privilege of petitioner is specially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether an indigent defendant in a criminal case for whom counsel has been appointed to protect his interest on appeal of the state from a trial court order setting aside a jury verdict of guilty and granting him a new trial is deprived of his constitutional right to assistance of counsel, when the appointed counsel is allowed to withdraw without filing any brief or making any argument in support of the trial court's decision and order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth Amendment provision for the right of counsel as applied to the states in Section 1 of the Fourteenth Amendment as follows:

1. Sixth Amendment (in part):

> In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense.

2. Fourteenth Amendment, Section 1 (in part):

> . . . No State shall deprive any person of life, liberty, or property. without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 22, 1966, the petitioner was charged in the Superior Court of the State of Washington by information with two counts of second degree burglary. R.0040 to 0041. He was tried by jury and convicted on one count. The other count was dismissed.

His attorney then moved for a new trial, R.0096, and the trial court granted the motion on the ground that the court had erred in failing to give an instruction proposed by petitioner and because substantial justice was not done in the trial, in that the verdict was not supported by the evidence or by reasonable inferences therefrom. R.0004 to 0005; appendix pages A-6 to A-7 below. It was from this order setting aside the verdict of guilty that the state appealed.

Petitioner at this time was indigent and an attorney

was appointed to represent him on the state's appeal. R.0097; appendix page A-8 below. This appointed attorney did not file a brief or argue the case before the Supreme Court. He explained in a telephone call to the clerk of the Supreme Court, that he was withdrawing because he had been unable to contact his client, the petitioner. The clerk apparently conveyed this information to the Chief Justice and wrote to the attorney on October 23, 1967, that the Chief Justice had approved his withdrawal from the case *on condition that the attorney file an affidavit in the court stating that he had made diligent effort to locate his client and had been unable to do so.* R.0076a; appendix, page A-9 below. This condition was not complied with *until February* 21, 1969, sixteen months later. R.0077-0078; appendix, pages A-10 and A-11 below. Moreover, the affidavit even when belatedly filed did not comply with the court's directions concerning diligent inquiry as to the whereabouts of petitioner. cf. Appendix D, second paragraph, page A-9, below, with Appendix E, second paragraph, page A-10, below.

On December 14, 1967, fourteen months before this affidavit was filed, the court ruled on the appeal, setting aside the order granting the petitioner's new trial without ever receiving a brief or hearing an argument on behalf of petitioner. R.0063-0068. Appendix, pages A-1 to A-5, below.

The order granting a new trial was reversed and the case remanded to the trial court on January 15, 1968. R.0069. On January 26, 1968, judgment of conviction on the guilty verdict was entered against petitioner. Petitioner

gave timely notice of his appeal from his conviction and sentence, and this appeal is still pending in the court below.[2]

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

On December 14, 1968, petitioner, through his retained counsel, filed a motion to recall the remittitur of January 15, 1968 so that the state's appeal would be heard properly upon briefs and with counsel to assist petitioner. R.0091; appendix, page A-12, below. This motion was made immediately petitioner had retained counsel prepared to represent his interests. The motion to recall remittitur is apparently the only procedure recognized in Washington state practice by which the Supreme Court, upon being advised of jurisdictional, clerical, or other errors or deficiencies in a judgment already transmitted to the Superior Court may correct its judgment or decision. *Mathison v. Anderson,* 107 Wash. 617, 182 Pac. 622; *State ex rel. Phoenix Etc. Ins. Co. v. Superior Court,* 146 Wash. 679, 264 Pac. 988. See *Kosten v. Fleming,* 17 Wn.2d 500, 136 P.2d 449. The sole basis of this motion was that petitioner had been denied the assistance of counsel on the state's successful appeal to reverse the trial court's order setting aside the verdict of guilty against petitioner.

After hearing oral argument on this point the court below denied the petitioner's motion to recall the remit-

2. The appeal from the judgment of conviction entered on the reinstated verdict is not directly before the court on this petition, although if the remittitur is recalled, as petitioner asserts it must be, the conviction would necessarily be set aside while the court below *reconsiders* the state's appeal from the trial court judgment setting aside the guilty verdict.

titur on the day of the argument, March 14, 1960. R.0091. On April 7, 1969, petitioner filed a petition for rehearing of the motion. There is, however, no provision under Rule 50, Rules on Appeal, for rehearing of a *motion*. This petition was never acted upon by the court below. Hence, this petition for certiorari is directed to the order of March 14, 1969.

REASONS FOR GRANTING THE WRIT

Petitioner had counsel at trial, but on the state's appeal he was without funds to retain an attorney and except for appointment of counsel at the state's expense would be unrepresented on the appeal from the order entered in his favor by the court below. The withdrawal of appointed counsel seems clearly to have deprived him of the effective assistance of counsel required by the Sixth and Fourteenth Amendments.

The right of an accused to the effective assistance of counsel at every phase of his confrontation with the law in a criminal case is fundamental to due process. He is entitled to counsel at his trial, *Gideon v. Wainwright*, 372 U.S. 335; in pre-trial proceedings, *Escobedo v. Illinois*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436, on appeal, *Anders v. California*, 386 U.S. 738; *Entsminger v. Iowa*, 386 U.S. 748; and in post conviction proceedings for revocation of parole, *Mempa v. Rhay*, 389 U.S. 128. Obviously, the effective assistance of counsel is especially important in a case such as this where the indigent defendant has been successfully represented by able counsel at his trial, and the State appeals from an order entered setting aside a verdict of guilty. If he is deprived of as-

sistance of counsel on the appeal, his effective representation at the trial court level avails him nothing.

The decision of the court below denying petitioner's motion to recall the remittitur appears to be in direct conflict with *Anders* and *Entsminger* just cited above, where this court laid down procedures for the withdrawal of counsel consistent with due process and equal protection. Neither these nor any other appropriate procedures were followed in this case to assure a representation of petitioner's interests on the state's appeal.

The role of appointed counsel as an advocate required him to support his client's cause to the best of his ability. Indeed, appointed counsel's reason for withdrawing, as stated to the court, Appendix E below, that is his asserted inability to reach his client to confer with him, would appear to be high frivolous. The issues on the appeal were questions of law, matters upon which the appointed counsel, who was being paid by the state, and who was furnished at state expense a transcript of the record, could receive little if any assistance from his client, the merits of whose cause had already been attested to by the trial judge in setting aside he verdict of guilty.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, the order of March 14, 1969, should be summarily set aside and the case remanded to the Supreme Court of the State of Washington with instructions to recall the remittitur and to grant a rehearing of the appeal of the state from the order setting

aside the guilty verdict, with provision for effective assistance of counsel for petitioner on this appeal.

Respectfully submitted,

JOHN CAUGHLAN
Attorney for Petitioner
IRVING C. PAUL
ROGER W. JOHNSON
Of Counsel

APPENDIX A

Opinion of the Washington State Supreme Court, *State v. Collins*, 72 Wn.2d 741, 435 P.2d 538, decided December 14, 1967.

The State of Washington, *Appellant*,

v.

Bishop Collins, *Respondent*.

Appeal from an order of the Superior Court for King County, No. 44665, Lloyd Shorett, J., entered November 18, 1966. *Reversed*.

Prosecution for burglary. The state appeals from an order granting the defendant a new trial after a verdict of guilty.

Charles O. Carroll, John S. Ludwigson, and *Thomas Wampold,* for appellant.

HUNTER, J.—This is an appeal by the state of Washington from an order of the Superior Court for King County, granting a new trial to defendant (respondent) Bishop Collins after a jury had convicted him of second-degree burglary. The record shows the following:

Michael D. Ebben was awakened by a noise in his Seattle apartment about 3 o'clock on the morning of June 17, 1966. He heard the door slam and when he looked in his trousers for his wallet, which had contained one $20 bill and seven $1 bills, he discovered that it was missing. Ebben awakened his roommates, Carl Stewart and David Nygren, who quickly dressed and went outside. While still in the hallway, they observed a male person wearing "baggy pants" walking in the street in front of the apartment. Once outside they saw a person wearing "baggy pants" walking in a northerly direction

on 12th Avenue N.E. They then lost sight of this individual but shortly thereafter saw a person walking in the same direction in an alley paralleling 12th Avenue N.E. They made their way between two buildings to the alley and found the defendant in custody of two police officers. A search of the area disclosed Ebben's empty wallet in a rockery located between his apartment and the place where the defendant had been apprehended.

Mrs. Elizabeth Wiesen, who lives across the alley from the Ebben apartment, testified that she was awakened by a prowler in her apartment about 3 o'clock the same morning; and that she observed a man wearing a sweater and "baggy gray slacks" fleeing out the door. She reported this to the police. The officers who arrested the defendant in the alley had responded to Mrs. Wiesen's report.

When the defendant was searched, he was found in possession of $32, in denominations of seven $1 bills, one $5 bill, and one $20 bill. Witnesses testified that he was wearing dark colored baggy slacks, and a cardigan sweater over a gray sweatshirt.

The defendant, a Negro, told the arresting officers his car was stuck in the alley and he had a friend in the area he was attempting to locate to assist him. He said that two white men were chasing him, which was the reason he was running. The defendant did not name or give the address of his friend. The defendant repeated this story at the trial.

The defendant was charged by information with burglary on two counts: (1) for entering the dwelling of Elizabeth Wiesen with intent to commit a crime, and

(2) for entering the dwelling of Michael D. Ebben with intent to commit a crime. Count 1 was dismissed by the trial court for insufficient evidence at the conclusion of the state's case. The jury returned a verdict of guilty on count 2.

The trial court granted defendant's motion for a new trial on two grounds: (1) that it erred in failing to give defendant's Instruction No. 1, *infra*, and (2) that the verdict denied the defendant substantial justice. The trial court concluded that under the case of *State v. Mevis*, 53 Wn.2d 377, 333 P.2d 1095 (1959), it had no alternative but to give the defendant's proposed Instruction No. 1. We disagree. The instruction as proposed reads as follows:

> Where a person is accused of burglary, proof of recent possession of the property alleged to have been stolen from the premises is not of itself sufficient to justify a conviction of burglary. Therefore, you must find beyond a reasonable doubt that the property, if any, in possession of the defendant was the same property allegedly stolen in the burglary. Then and only then may you consider proof of recent possession of the property alleged to have been stolen as evidence of participation in the burglary alleged. Even if you do consider the evidence, the defendant's possession of this property is not alone sufficient to warrant you in finding him guilty, but is merely a circumstance which may be taken in connection with all the other facts and circumstances in the case in arriving at your verdict.

Under *Mevis, supra*, the jury is entitled to know that no inference can be drawn from the evidence of property in the possession of the defendant unless the jury finds it to be recently stolen property, and that in any event such possession cannot constitute the whole case against the

defendant. However, the instruction as drawn is erroneous. It is objectionable, first, because it unduly emphasizes consideration of certain items of evidence in the case. As proposed, it requires that the jury, *must* find, beyond a reasonable doubt, that the property in defendant's possession was stolen, and that *then and only then,* can this property be considered as evidence of the defendant's guilt, along with the other evidence. There is a danger, inherent in the instruction, that the jury may be misled into thinking that if it finds that the property was not stolen, this determination is more significant than the consideration of other evidence in determining the ultimate guilt or innocence of the defentant. Also, the instruction repeats the injunction that proof of possession of recently stolen property is not alone enough to convict the defendant of burglary, thereby unfairly overemphasizing this admonition. Moreover, the instruction fails to state that defendant's possession of recently stolen property may be proven by either direct or circumstantial evidence as required in *Mevis, supra,* p. 382. It is the cumulative effect of the foregoing which renders the instruction erroneous. We have often said that an instruction erroneously drawn need not be given. *Adams v. State,* 71 Wn.2d 414, 429 P.2d 109 (1967); *Vogel v. Alaska S.S. Co.,* 69 Wn.2d 497, 419 P.2d 141 (1966). The court in its oral opinion concedes that the proposed instruction would require rewording before it could be given. The failure to give this instruction as proposed was not error, and therefore cannot constitute a ground for granting the defendant a new trial.

The trial court's second ground, that substantial justice had not been done, is unsupported, except for what ap-

pears in the oral opinion, by reasons of fact or law as required by Rule of Pleading, Practice and Procedure 59.04W, R.C.W. vol. 0, now Civil Rule for Superior Court 59(a)(f). Absent such reasons, we will not sustain the granting of the motion. *Johnson v. Department of Labor & Indus.*, 46 Wn.2d 463, 466, 281 P.2d 994 (1955). It appears from the oral opinion that the sole basis for granting the motion for new trial on the ground that substantial justice had not been done was that the court disagreed with the jury's verdict on the evidence. This is not a ground for awarding a new trial, and we will uphold the verdict if we find, as we do in this case, that it is supported by substantial evidence. *Bunnell v. Barr*, 68 Wn.2d 771, 415 P.2d 640 (1966); *Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964).

The order granting a new trial is reversed, and the cause is remanded for reinstatement of the jury verdict.

FINLEY, C. J., DONWORTH and NEILL, JJ., and WARD, J. Pro Tem., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 ORDER GRANTING NEW TRIAL

THIS MATTER having come on duly and regularly before the undersigned judge of the above-entitled court upon the motion of the defendant, Bishop Collins, by and through his attorneys, Edmund J. Wood and Walter T. Greenaway, and argument having been heard upon the matter on October 14, 1966 and again on November 2, 1966, and the court being familiar with the records and files herein, and being fully advised in the premises,

NOW THEREFORE,

IT IS HEREBY ORDERED that a new trial be granted in the above-entitled cause for the following reasons:

1. The court erroneously refused to give defendant's proposed instruction relating to circumstantial evidence and proof of possession of recently stolen property, said instruction reading as follows:

> Where a person is accused of burglary, proof of recent possession of the property alleged to have been stolen from the premises is not of itself sufficient to justify a conviction of burglary. Therefore, you must find beyond a reasonable doubt that the

property, if any, in possession of the defendant was the same property allegedly stolen in the burglary. Then and only then may you consider proof of recent possession of the property alleged to have been stolen as evidence of participation in the burglary alleged. Even if you do consider the evidence, the defendant's possession of this property is not alone sufficient to warrant you in finding him guilty, but is merely a circumstance which may be taken in connection with all other facts and circumstances in the case in arriving at your verdict.

2. The court felt additionally that substantial justice was not done in considering the evidence produced in the case.

DONE IN OPEN COURT THIS 18th day of November, 1966.

s/LLOYD SHORETT
Judge

Presented by:
Deputy Prosecuting Attorney
s/JOHN S. LUDWIGRON
Approved for Entry:
s/WALTER T. GREENAWAY
Attorney for Defendant

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 Order Appointing Counsel for Defendant on appeal

The defendant in this cause having appeared in open court to request the appointment of counsel to represent him herein and the defendant having been interrogated by the court and having been found to be without means with which to employ counsel and being desirous of having such representation, now, therefore,

IT IS ORDERED that WALTER T. GREENAWAY, a member of the bar, be and he is designated and appointed as attorney for the above-named defendant on appeal and to represent him throughout these proceedings until relieved pursuant to Rule 66 of the Special Rules of the Superior Court for this county.

DONE IN OPEN COURT this 17th day of August 1967.

s/H. C. AGNEW
Presiding Judge

Copy mailed to
Appointed Counsel

APPENDIX D

October 23, 1967

Mr. Walter T. Greenaway
Attorney at Law
620 Arctic Building
Seattle, Washington

Dear Mr. Greenaway:

Re: No. 39303—State v. Collins

Reference is made to your telephone conversation in which you stated that although you are court appointed counsel for the defendant/respondent, you do not intend to file a brief on his behalf since you are unable to locate the defendant and have no means of finding him.

The Chief Justice has approved your intentions provided that you file an affidavit setting forth that you have made diligent effort to locate the defendant including inquiries of the bondsman, if the defendant posted bond; the sheriff; relatives, if known; etc. and that these efforts have not been successful.

Very truly yours,
William M. Lowry
Clerk

WML:mas
cc: Honorable Charles O. Carroll

APPENDIX E

AFFIDAVIT

STATE OF WASHINGTON }
COUNTY OF KING } ss.

WALTER T. GREENAWAY, being first duly sworn on oath, deposes and says:

That I was on separate occasions both retained and Court appointed attorney for Bishop Collins in the criminal matter filed and heard in the Superior Court of King County, and subsequently brought before the Supreme Court on appeal.

At no time during the attempted representation was I able to obtain any cooperation from Mr. Collins. Affiant on numerous occasions attempted unsuccessfully by telephone and letter to contact Mr. Collins relative to the matter on appeal. More specifically, my office records reflect unsuccessful attempts to contact Mr. Collins during 1967 in the months of March, May, June, July and August. My records also reflect two broken office appointments on June 5, 1967 and July 10, 1967. My records further reflect that I conferred with the Prosecuting Attorney on August 9, 1967 in an unsuccessful attempt to locate Mr. Collins.

Affiant also related this information to the Court at Olympia by telephone call on July 20, 1967. Subsequent to said telephone call I did indicate my withdrawal from the case because of my inability to maintain any contact whatsoever with my supposed client.

Affiant states that he was unable for the above reasons

to represent Mr. Collins adequately, and based on said reasons did in fact withdraw from the case.

s/WALTER T. GREENAWAY

SUBSCRIBED AND SWORN TO before me this 20th day of February, 1969.

s/JUDITH ANN LIBBY

Notary Public in and for the State of Washington, residing at Seattle

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Appellant,* v. BISHOP COLLINS, *Respondent.*	No. 39303 Motion and Affidavit for Order Recalling Remittitur

COMES NOW the respondent, Bishop Collins, by and through his attorney, Irving C. Paul, Jr., and moves the Court for an Order herein recalling the Remittitur heretofore issued herein. The basis for this Motion is that appointed counsel for respondent in regard to this appeal failed to file a brief herein and failed to argue the matter before this Court. This motion is further based upon the record and file herein and the Affidavit below following.

s/IRVING C. PAUL
Attorney for Respondent

STATE OF WASHINGTON }
COUNTY OF KING } ss.

BISHOP COLLINS, being first duly sworn upon oath deposes and says: That he was convicted of the crime of burglary in the Second Degree in King County on September 27, 1966. On November 18, 1966 the trial court entered an Order granting respondent a new trial. Walter T. Greenaway had been appointed by the Superior Court of the State of Washington for the purpose of handling all matters in regard to an appeal. Affiant states and believes that he was advised that Mr. Walter T. Greenaway would represent the interest of respondent in re-

gard to the appeal taken by the State of Washington from Judge Shorett's order granting a new trial.

That at all times affiant was ready, willing and able to confer with Walter T. Greenaway in regard to matters relating to the appeal of the State of Washington. In any case the matters presented by the said appeal by the State of Washington presented questions of fact and law in the record and that cooperation of respondent, Bishop Collins, was not necessary in order that the said Mr. Greenaway properly present the matter to the Supreme Court.

s/BISHOP COLLINS

SUBSCRIBED AND SWORN to before me this 13th day of December, 1968.

s/JANET L. BARR
Notary Public in and for the State
of Washington, residing at Seattle

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STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

CHARLES O. CARROLL
King County Prosecuting Attorney
ALBERT A. RINALDI, JR.
Deputy Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
Attorneys for Respondent

Office and Post Office Address:
W554 King County Courthouse
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.



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IN THE

Supreme Court of the United States

October Term, 1969

No. 237

BISHOP COLLINS,
Petitioner,

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STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, State of Washington, submits the following brief in opposition to the granting of a writ of certiorari to review the order denying the motion to recall the remittitur entered by the Supreme Court of the State of Washington on March 14, 1969.

CITATIONS TO OPINIONS BELOW

The citations to the opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Supreme Court of the State of Washington should be required to recall its remittitur and again decide the legality of a proposed jury instruction where retained counsel for the defendant, who successfully argued his motion for a new trial, is later appointed on the State's appeal of the order granting a new trial, where appointed counsel has signed a statement of facts and a supplemental agreed statement of facts where the only issue before the Supreme Court of the State of Washington on the appeal from the order granting a new trial was an issue of law regarding a proposed jury instruction which could be decided without brief or argument by counsel, where the defendant had not cooperated with appointed counsel and where an appeal from the entry of the judgment and sentence is still pending at which time the issue of the propriety of the proposed instruction can again be raised.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are adequately set forth in the petition.

STATEMENT OF THE CASE

On July 22, 1966, the petitioner Bishop Collins was charged by information filed in the Superior Court of King County, State of Washington, with the crime of

burglary in the second degree, Count I and Count II. He was tried before a jury on September 26 and 27, 1966 and convicted by the jury of Count II on September 27, 1966. Count I was dismissed at the end of the State's case on the basis of insufficient evidence. At the trial, the petitioner was represented by attorney Edmund J. Wood and the respondent was represented by Charles O. Carroll, King County Prosecuting Attorney, by his deputy John S. Ludwigson.

On September 29, 1966 a motion for a new trial was filed by attorney Edmund J. Wood (R. 0096). It is set forth in full at appendix page A-1. Mr. Wood subsequently withdrew from the case and was replaced by Walter Greenaway, who was retained by the petitioner. Argument on the motion was made before the trial judge, the Honorable Lloyd Shorett, by Mr. Greenaway and Mr. Ludwigson on October 14, 1966 and again on November 2, 1966. On November 18, 1966 Judge Shorett signed an order granting a new trial. It is set forth in full in the appendix page A-6 to A-7 of the petition.

The State then filed notice of appeal on November 23, 1966 (R. 0001-0003). A statement of facts was filed on February 17, 1967 with the Superior Court of the State of Washington (R. 0043-0057) and a supplemental agreed statement of facts was filed with the Superior Court of the State of Washington on April 26, 1967 (R. 0058-0061). The petitioner's counsel Mr. Greenaway signed both the statement of facts and the supplemental agreed statement of facts.

On August 17, 1967, Mr. Greenaway was appointed counsel for the appeal (R. 0097). Subsequently on or

about October 23, 1967 Mr. Greenaway telephoned Mr. William M. Lowry, Clerk of the Washington State Supreme Court, and indicated that he did not intend to file a brief on behalf of the petitioner since he was unable to locate the petitioner and had no means of finding him. Mr. Lowry responded with a letter dated October 23, 1967 (which is set forth in full in appendix page A-9 of the petition) to the effect that the intentions of Mr. Greenaway were approved if Mr. Greenaway would file an affidavit setting forth that diligent efforts to locate the petitioner had been made. Mr. Greenaway did file the affidavit on February 20, 1969. It is set forth in full in appendix page A-10 through A-11 of the petition.

Mr. Greenaway did not file a brief on behalf of the petitioner nor did he appear at the time set for argument. Mr. Ludwigson did file a brief for the State of Washington (R. 0062) and Thomas Wampold represented the State at the time of argument. On December 14, 1967 the Washington State Supreme Court, after having reviewed the merits of the appeal, entered an order reversing the Superior Court's order granting a new trial, and the cause was remanded for reinstatement of the jury verdict (R. 0063 to R. 0068) reported at 72 Wn.2d 741, 435 P.2d 538 (1967). On January 15, 1968 the Washington State Supreme Court remitted its decision of December 14, 1967 to the Superior Court for the State of Washington (R. 0069). Judgment and sentence was entered on January 26, 1968 (R. 0098). On February 9, 1968 timely notice of appeal was filed by the petitioner which appeal is still pending in the court below.

Mr. Irving C. Paul, Jr., was subsequently retained by

petitioner and on December 13, 1968, filed a motion and affidavit for an order recalling the remittitur (R. 0070-0071).

Memorandum briefs were filed by petitioner (R. 0072-0076) and respondent (R. 0079-0090). On March 14, 1969 argument was made to the Supreme Court of the State of Washington by Irving Paul, Jr. counsel for petitioner and Charles O. Carroll, King County Prosecuting Attorney, by his deputy Albert A. Rinaldi, Jr. The motion to recall the remittitur was denied (R. 0091). Petitioner then filed a petition for rehearing on April 7, 1969 (R. 0092-0095), which was not acted upon by the Supreme Court of the State of Washington. The letter of April 15, 1969 from Supreme Court Clerk William M. Lowry is set forth in full in appendix page A-2. The petition for certiorari is directed to the order of March 14, 1969.

ARGUMENTS AGAINST GRANTING WRIT OF CERTIORARI

United States Supreme Court Rule 19, 28 U.S.C.A., states in substance that the writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore, *Fay v. Noia,* 372 U.S. 391. Respondent submits that there are no special and important reasons for granting the writ in this case.

When the Washington State Supreme Court entered its opinion of December 14, 1967 in *State v. Collins,* 72 Wn.2d 741, 435 P.2d 538, which is set forth in full at appendix page A-1 to A-5 of the petition; it had before it a statement of facts (R. 0043 to 0057), an agreed

statement of facts (R. 0058-0061), the proposed instructions of the petitioner (R. 0018-0022) and the Superior Court's instructions to the jury (R. 0006-0017). Since the statement of facts and supplemental agreed statement of facts complied with Rule 34 and Rule 36 of the Washington State Supreme Court rules on appeal, it was unnecessary to submit a statement of facts of the entire trial proceedings. The pertinent portions of Rule 34 and Rule 36 are set forth at appendix A-3 and A-4. Further, the same counsel who was latter appointed to represent petitioner on the appeal signed both the agreed statement of facts and the supplemental agreed statement of facts.

The only issue before that court on the State's appeal from the order granting the new trial was the propriety of petitioner's proposed instruction on recently stolen property. The question was very narrow and only a question of law. It is true that appointed counsel for the petitioner did not file a brief nor did he argue before the court. However, to say that it was necessary for this to be done is to say that the Washington Supreme Court was not capable of deciding the propriety of a proposed instruction when it had all of the facts and instructions before it. A reading of the decision in the *Collins* case, *supra,* will indicate that the court in that case was quite positive in its determination that petitioner's proposed instruction was not proper.

The petitioner argues that he was deprived of his right to effective assitance of counsel because appointed counsel did not file a brief nor did he argue before the Washington Supreme Court. Then petitioner goes on to cite *Gideon v. Wainwright,* 372 U.S. 335; *Escabedo v.*

Illinois, 378 U.S. 478; *Miranda v. Arizona,* 384 U.S. 436; *Anders v. California,* 386 U.S. 738; *Entsminger v. Iowa,* 386 U.S. 748 and *Mempa v. Rhay,* 389 U.S. 128. Of these cases cited, only the *Anders* and *Entsminger* cases have any relation to the case at hand and both can be distinguished from the case at hand.

In *Entsminger,* this court was mostly concerned with the fact that the lower court did not have a proper transcript before it upon which to base its decision. In this case, as pointed out above, all of the facts necessary for the decision were before the Washington State Supreme Court.

The *Anders* case, although closer to this case, can nonetheless be distinguished from this case. The *Anders* case involved an appeal from a conviction by the defendant; this case involved an appeal by the State from an order granting a new trial. In *Anders* the petitioner wished to file and in fact did file a brief. In this case petitioner could not be located by appointed counsel. In *Anders* there was a request for the appointment of another attorney while in this case there was none since petitioner could not be located. Finally, in *Anders,* the Appellate Court was called upon to review the alleged errors committed at the trial level while in this case, as indicated above, the issue was very limited, i.e., the propriety of the petitioner's proposed instruction. Since on its facts *Anders* differs from this case, this court has another reason to deny the writ.

A further reason for denying the writ is that there is an appeal from the judgment and sentence of the petitioner (R. 0098) which is still pending in the Wash-

ington State Supreme Court. The petitioner may be able to raise the issue of the propriety of the proposed jury instruction on that appeal. Admittedly, the State will most likely argue that the decision in the earlier *Collins* case, *supra*, becomes the law of the case, and thus the petitioner might have some difficulty in urging the Washington State Supreme Court to review its decision in the earlier *Collins* case. However, it is respondent's position as pointed out earlier that the decision in the *Collins* case was a sound one and if the Washington State Supreme Court is required to review it, the decision will be the same way.

Much emphasis is placed by petitioner upon the concept of the effective assistance of counsel. But what must appointed counsel do when he is unable to locate the petitioner and the petitioner does not assist counsel? Certainly there must be a duty upon the petitioner to keep appointed counsel informed of his whereabouts. It is submitted that petitioner is not without fault and should not be granted this discretionary writ.

In *State v. Louie*, 68 Wn.2d 304, 413 P.2d 17, the Washington State Supreme Court said it must look to substance and not labels in ascertaining whether constitutional rights to assistance of counsel have been violated. It is submitted that the same substance test should be applied here. If this court grants the writ as requested by the petitioner, it will require the Washington Supreme Court to needlessly review a decision which it has made, when it had all of the facts and instructions before it, without a showing by the petitioner that the court will or should decide that limited issue differently. Perhaps the

Washington State Supreme Court felt that there was no substance in the petitioner's arguments when it denied the motion to recall the remittitur on March 14, 1969. It is submitted that there is no substance to petitioner's arguments since they are in fact frivolous.

Finally, the petition should be denied because the decision of the Washington State Supreme Court in refusing to recall the remittitur was correct. A reading of the *Collins* case, *supra*, clearly indicates that the proposed instruction of the petitioner was not properly drawn since it required that the respondent prove beyond a reasonable doubt that the property in question was recently stolen. This would require too great an emphasis upon one instruction when all of the instructions should be considered as a whole. Since the instruction was erroneous, it need not have been given, and if the Washington State Supreme Court were to review its decision it would arrive at the same result.

CONCLUSION

The petition for a writ of certiorari should be denied since there are no special and important reasons to grant it, petitioner was not denied effective assistance of counsel, an appeal is still pending in the Washington State

Supreme Court, the petitioner's arguments are frivolous, and the decision by the Washington State Supreme Court in the *Collins* case was correct.

Respectfully submitted,

CHARLES O. CARROLL
King County Prosecuting Attorney
ALBERT A. RINALDI, JR.
Deputy Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
Attorneys for Respondent

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 MOTION FOR NEW TRIAL

The defendant Bishop Collins, by and through his attorney Edmund J. Wood, moves for a new trial on the following grounds:

1. That there is no evidence or reasonable inference from the evidence to justify the verdict.
2. Error in law occurring at the trial and expected at the time by the defendant, to-wit, failure of the court to give the defendant's proposed instruction.

s/EDMUND J. WOOD
Of Coney & Collier
Attorney for Defendant

APPENDIX B

April 15, 1969

Mr. Irving C. Paul, Jr.
Attorney at Law
620 Arctic Building
Seattle, Washington 98104

Honorable Charles O. Carroll
Prosecuting Attorney
King County Courthouse
Seattle, Washington 98104

Gentlemen:

Re: No. 39303—State v. Bishop Collins

Respondent Bishop Collins' petition for rehearing of the Court's order of March 14, 1969, was filed on April 7, 1969.

The only provision for consideration of a petition for rehearing is contained in ROA 50. ROA 50 provides for a petition for rehearing after an opinion is filed. The petition in question is directed to an order not to an opinion. There being no provision for the consideration of a petition for rehearing under the instant circumstances, it will be filed without action.

Very truly yours,

s/WILLIAM M. LOWRY
Clerk

WML:mas

APPENDIX C

RULE 34—*Statement ~~of~~ facts—Time for serving and filing—Certification.*

. . . (4) (Appeal on agreed statement of facts.) When the question or questions presented by an appeal in any cause can be determined without an examination of all the pleadings, evidence, and proceedings in the superior court, the parties may prepare and sign a statement of the case showing how the question or questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the question or questions by this court. The statement shall include a copy of the judgment from which the appeal is taken, a copy of the notice of appeal and of the appeal bond, together with their respective filing dates, and *a concise statement of the points to be relied on by the appellant,* and shall be filed with the clerk of the superior court within the time provided for the filing of a statement of facts. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the question or questions raised by the appeal shall be approved in writing by the trial judge and, when so approved, shall constitute the record on appeal, and be transmitted to this court in the same manner as a statement of facts.

APPENDIX D

RULE 36—*Statement of facts—Amendments—Notice to settle.*

A party desiring to have a statement of facts certified must prepare the same as proposed by him file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party any amendments which he may propose to the statement: *Provided,* That the superior court may extend the time not to exceed an additional twenty days for filing and serving proposed amendments to the proposed statement of facts, if good cause be shown and the application for extension of time be made within the ten-day period, and after notice to opposing counsel, Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed statement shall be deemed agreed to and may be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and accepted, the statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments. [Adopted Nov. 22, 1950, effective Jan. 2, 1951; rule amended, adopted Dec. 12, 1956, effective Mar. 1, 1957.]